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266 NLRB No. 182

D--9927  
Tulare, CA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BERRYFAST, INC.

and

Case 32--CA--5088

SEQUOIA DISTRICT COUNCIL OF  
CARPENTERS, UNITED BROTHERHOOD  
OF CARPENTERS AND JOINERS OF  
AMERICA, AFL--CIO

DECISION AND ORDER

Upon a charge filed on 9 December 1982 by Sequoia District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL--CIO, herein called the Union, and duly served on Berryfast, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, issued a complaint on 5 January 1983 against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on 12 October 1982, following a Board election in Case 32--RC--1418, the Union was duly certified as

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the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;<sup>1</sup> and that, commencing on or about 2 December 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On 21 January 1983 Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations of the complaint.

On 28 February 1983 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on 2 March 1983 the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. In response to the Notice To Show Cause, Respondent filed a brief opposing the General Counsel's Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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<sup>1</sup> Official notice is taken of the record in the representation proceeding, Case 32--RC--1418, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, Inc., 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); Intertype Co. v. Penello, 269 F.Supp. 573 (D.C.Va. 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent asserts that the Union's certification in Case 32--RC--1418 was improperly issued. It contends that, because employee Jeanette Turner was wrongly denied her right to vote through no fault of her own, the Board should set aside the initial election in that case and hold a second election. Respondent admits that it has refused, and continues to refuse, to bargain with the Union, but argues that it has no legal obligation to do so.

In her Motion for Summary Judgment, counsel for the General Counsel asserts that Respondent is raising issues which were raised and determined by the Board in the underlying representation proceeding. We agree with counsel for the General Counsel.

Our review of the record herein, including the record in Case 32--RC--1418, discloses that the Union filed a petition for an election on 8 July 1981. On 13 August 1981, the Regional Director approved a Stipulation for Certification Upon Consent Election, which directed that an election be held among the employees in the following units:

Voting Group A

All full-time and regular part-time office clerical employees employed by the Employer at its 1648 W. Tulare Avenue, Tulare, California facility; excluding all other employees, production and maintenance employees, sales employees, managerial/confidential

employees, professional employees, guards, and supervisors as defined in the Act.

Voting Group B

All full-time and regular part-time production and maintenance employees including employees in the following departments: Production, Tool Assembly and Parts, Engineering, Machine Shop, Quality Control, Shipping, Receiving and Warehouse, Maintenance and employees in the following job classifications: leadmen, Numerical Control (N/C) operators, draftsmen and truck drivers employed by the Employer at its 1648 W. Tulare Avenue, Tulare, California facility; excluding office clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act.

An election by secret ballot was conducted on 11 September 1981. In Voting Group A, out of four eligible voters one voted for the Union and two voted against it. There was one challenged ballot which was not determinative of the results of the election.<sup>2</sup> In Voting Group B, out of 36 eligible voters, 18 voted for the Union and 17 voted against it. There was one challenged ballot which was determinative of the results of the election.

On 18 September 1981 Respondent filed timely objections to conduct affecting the results of the election held in Voting Group B. On 1 December 1981, pursuant to an investigation of Respondent's objections, the Regional Director directed a hearing on Respondent's Objections 1--5 and on the challenged ballot of Anthony Gunn. On 10 March 1982 the Hearing Officer issued his Report on Challenged Ballots and Objections, in which he recommended that the challenge to the ballot of Anthony Gunn be sustained; that Respondent's Objection 1 be sustained, the

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<sup>2</sup> On 25 November 1981 the Regional Director certified the results of the Voting Group A election.

employees, professional employees, guards, and supervisors as defined in the Act.

Voting Group B

All full-time and regular part-time production and maintenance employees including employees in the following departments: Production, Tool Assembly and Parts, Engineering, Machine Shop, Quality Control, Shipping, Receiving and Warehouse, Maintenance and employees in the following job classifications: leadmen, Numerical Control (N/C) operators, draftsmen and truck drivers employed by the Employer at its 1648 W. Tulare Avenue, Tulare, California facility; excluding office clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act.

An election by secret ballot was conducted on 11 September 1981. In Voting Group A, out of four eligible voters one voted for the Union and two voted against it. There was one challenged ballot which was not determinative of the results of the election.<sup>2</sup> In Voting Group B, out of 36 eligible voters, 18 voted for the Union and 17 voted against it. There was one challenged ballot which was determinative of the results of the election.

On 18 September 1981 Respondent filed timely objections to conduct affecting the results of the election held in Voting Group B. On 1 December 1981, pursuant to an investigation of Respondent's objections, the Regional Director directed a hearing on Respondent's Objections 1--5 and on the challenged ballot of Anthony Gunn. On 10 March 1982 the Hearing Officer issued his Report on Challenged Ballots and Objections, in which he recommended that the challenge to the ballot of Anthony Gunn be sustained; that Respondent's Objection 1 be sustained, the

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<sup>2</sup> On 25 November 1981 the Regional Director certified the results of the Voting Group A election.

election set aside, and a second election held; and that Respondent's Objections 2--5 be overruled.

The Union took exception to the Hearing Officer's recommendation that Respondent's Objection 1 be sustained and the election set aside. On 12 October 1982 the Board, finding merit in the Union's exception, overruled the Hearing Officer's recommendation on Respondent's Objection 1 and certified the Union as the exclusive bargaining representative of Respondent's employees in Voting Group B.<sup>3</sup> In a letter dated 6 November 1982, the Union noted its certification by the Board and expressed its wish to begin negotiations with Respondent immediately. By phone call of 2 December 1982, Respondent notified the Union that it considered the Board's certification of the Union invalid and that it would therefore decline to bargain with the Union. Respondent has refused at all times since 2 December 1982 to bargain with the Union.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.<sup>4</sup>

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly

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<sup>3</sup> The Board's decision in Case 32--RC--1418 is reported at 265 NLRB No. 4.

<sup>4</sup> See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

discovered or previously unavailable evidence, and it does not allege any special circumstances which would require the Board to reexamine the decision made in the representation proceeding.<sup>5</sup> We therefore find that Respondent has raised no issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

#### Findings of Fact

##### I. The Business of Respondent

At all times material to this proceeding Respondent has been a California corporation, with an office and place of business in Tulare, California, engaged in the manufacture and nonretail sale of nails, fasteners, and fastening tools. During the 12 months prior to 5 January 1983, Respondent, in the course and conduct of its business operations, sold and shipped goods and supplies valued in excess of \$50,000 directly to customers located outside of the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

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<sup>5</sup> Respondent contends that the Board's decision in the underlying representation proceeding was an unwarranted departure from established precedent. It further argues that this alleged departure constitutes a "special circumstance" requiring the Board to reexamine its previous decision and invalidate the Union's certification. We find no merit in these contentions.

## II. The Labor Organization Involved

Sequoia District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

## III. The Unfair Labor Practices

### A. The Representation Proceeding

#### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees in the following departments: Production, Tool Assembly and Parts, Engineering, Machine Shop, Quality Control, Shipping, Receiving and Warehouse, Maintenance and employees in the following job classifications: leadmen, Numerical Control (N/C) operators, draftsmen, and truck drivers employed by Respondent at its 1648 W. Tulare Avenue, Tulare, California facility; excluding office clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act.

#### 2. The certification

On 11 September 1981 a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 32, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in the unit on 12 October 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.



B. The Request To Bargain and Respondent's Refusal

Commencing on or about 16 November 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all employees in the above-described unit. Commencing on or about 2 December 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since 2 December 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent Berryfast, Inc., set forth in section III, above, occurring in connection with its operations described in section 1, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962); Commerce Company d/b/a Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

## Conclusions of Law

1. Berryfast, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Sequoia District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time production and maintenance employees including employees in the following departments: Production, Tool Assembly and Parts, Engineering, Machine Shop, Quality Control, Shipping, Receiving and Warehouse, Maintenance and employees in the following job classifications: leadmen, Numerical Control (N/C) operators, draftsmen, and truck drivers employed by Respondent at its 1648 W. Tulare Avenue, Tulare, California facility, excluding office clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since 12 October 1982 the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about 2 December 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all of its employees in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has

engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Berryfast, Inc., Tulare, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Sequoia District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL--CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees including employees in the following departments: Production, Tool Assembly and Parts, Engineering, Machine Shop, Quality Control, Shipping, Receiving and Warehouse, Maintenance and employees in the following job classifications: leadmen, Numerical Control (N/C) operators, draftsmen, and truck drivers employed by Respondent at its 1648 W. Tulare Avenue, Tulare, California facility; excluding office clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Tulare, California, facility copies of the attached notice marked "'Appendix.'"<sup>6</sup> Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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<sup>6</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "'POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'" shall read "'POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.'"

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Tulare, California, facility copies of the attached notice marked "'Appendix.'"<sup>6</sup> Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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<sup>6</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "'POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'" shall read "'POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.'"

(c) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C.      5 July 1983

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Donald L. Dotson,            Chairman

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Don A. Zimmerman,          Member

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Robert P. Hunter,          Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Sequoia District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL--CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time production and maintenance employees in the following departments: Production, Tool Assembly and Parts, Engineering, Machine Shop, Quality Control, Shipping, Receiving and Warehouse, Maintenance and employees in the following job classifications: leadmen, Numerical Control (N/C) operators, draftsmen, and truck drivers employed by



us at our 1648 W. Tulare Avenue, Tulare,  
California facility; excluding office  
clerical employees, sales employees,  
professional employees, guards and  
supervisors as defined in the Act.

BERRYFAST, INC.

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(Employer)

Dated ----- By -----  
(Representative) (Title)

This is an official notice and must not be defaced by  
anyone.

This notice must remain posted for 60 consecutive days from  
the date of posting and must not be altered, defaced, or covered  
by any other material. Any questions concerning this notice or  
compliance with its provisions may be directed to the Board's  
Office, Breuner Building, Second Floor, 2201 Broadway, P.O. Box  
12983, Oakland, California 94604, Telephone 415--273--6122.